No. 15,813

In the United States Court of Appeals for the Ninth Circuit

MANUEL C. BLAS and THE ESTATE OF JOSE MARTINEZ TORRES, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court of Guam, Territory of Guam

BRIEF FOR THE UNITED STATES, APPELLEE

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CITATIONS

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OPINION BELOW

The district court did not write an opinion. Its grounds for directing a verdict are stated at R. 111-117.

JURISDICTION

This is an appeal filed on June 26, 1957 (R. 33-34), from a judgment (R. 27-30) filed on April 12, 1957, awarding just compensation for property condemned by the United States. A motion by appellants to set aside the order and judgment and for new trial (R. 31-32) was denied on May 3, 1957 (R. 33). The jurisdiction of the district court was invoked under

Sections 1237 to 1258, inclusive, as amended, of the Code of Civil Procedure of Guam, and 48 U.S.C. sec. 1424. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

1. Whether, in a condemnation proceeding, the United States was required to pay an enhanced value for land, which enhancement had been created by the expenditure of large sums of money by the United States for the rehabilitation of the Island of Guam and its people following World War II.

2. Whether the district court erred in directing a verdict on the testimony of the expert witness of the United States which excluded the enhancement in the value of the land which had been created by the United States, when the only testimony presented by the landowners included such enhancement.

STATEMENT

On April 11, 1949, the United States [1] instituted proceedings to condemn the fee simple title to certain lands in the Municipality of Barrigada, Island of Guam, Marianas Islands, for use as the permanent site of the Village of Barrigada as an aid to and in the furtherance of the program for the rehabilitation of the Guamanian people and the economy of Guam

[1] The Naval Government of Guam established its own court, known as the Superior Court, in which it filed condemnation proceedings. When the District Court of Guam was established, these condemnation cases were removed to that court by the United States (R. 34, item 7, Clerk's Certificate of Transmittal).

(R. 8-14, 22-26). A number of parcels under separate ownership was included in the proceeding, but only three parcels are here involved: Parcel 2, which is a part of Lot 1074, containing 40,104 square meters, owned by Manuel C. Blas; and Parcel 4, which is a part of Lot 1069, and Parcel 15, which is a part of Lot 1075, both containing a total of 88,606 square meters, owned by the Estate of Jose Martinez Torres. A declaration of taking was filed and estimated compensation was deposited for Parcel 2 in the amount of $600, and for Parcels 4 and 15 in the amount of $1,555 (R. 3-8, 14-21).

A trial before a jury for the determination of just compensation commenced on April 8, 1957. It was the Government's position that the use of the subject land had been changed from agricultural to commercial and residential during its occupancy under a lease since 1946, and the change in use had been created by the project for which the lands were condemned. Hence, the land should be valued as if on the date of taking it was in the same condition as it was at the beginning of the lease (R. 64-65, 94-95).

This change in the use of the land was corroborated by two of appellants' witnesses, who expressed the opinion that it was the establishment of the village by the Government's rehabilitation program that changed the use of the property from agricultural to residential and commercial (R. 63, 81, 90-91). They also testified that before the war there was a town of Barrigada farther up, but the subject lands were not included in that town (R. 64-65, 80, 85-86). Appellants' valuation witness, Calvo, stated that after

the war the Government was confronted with the necessity of reestablishing people in the village. It laid out roads and took over lands to build housing for the people (R. 90). Based on what he considered comparable sales, he valued the property for commercial or residential use at $500 for 5,000 square feet "or an equivalent to $1.00 per square meter" (R. 81-82).

The Government presented two appraisers for the Department of the Navy. Both had been on Guam for many years and were thoroughly familiar with the subject lands prior to and during the war, and with the development of Barrigada Village (R. 92-95, 101-102). One stated that before the Government started developing the property its value was $100 to $200 a hectare, a hectare being 10,000 square meters. He also stated that at the time of taking, 1949, Barrigada was an "organized village by the military government," and there were some "stores and poolhalls" in it (R. 99).

The other appraiser, Woelfl, stated that he found nine sales made during 1948 and 1949 of property which he considered comparable. He used the average of these sales of $230 per hectare to arrive at the value of the subject property. He gave greater value to the land having road frontage, approximately 170 feet in (R. 103-106, 109-110). As of April 11, 1949, he valued the subject property as follows: Lot 1074, four hectares, at $1,220, or $305 per hectare; Lot 1069 at $2,860, or $360 per hectare; and Lot 1075 at $565, or $250 per hectare [2] (R. 106-107).

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[2] Parcel 5, Lot 1068 (R. 107, 115), is not involved in this appeal.

At the close of the testimony, the Government moved for a directed verdict based upon the testimony of its witnesses on the grounds that there had been no relevant testimony by the landowners to support a verdict (R. 111). The court stated that there was nothing in any of the testimony introduced on behalf of the landowners to enable the jury to determine value. It directed a verdict and ordered that a judgment be prepared in the amounts testified to as the value of the lots by the Government's appraiser Woelfl (R. 111-115). In discharging the jury and informing it that a verdict had been directed, the court stated that there was no evidence to justify the conclusion of Calvo's testimony of value, and that a verdict based on his testimony would have to be set aside, as it would be awarding the former owners of this agricultural land a value based upon a built-up residential area which had been created by the Government (R. 116-117).

On April 12, 1957, a deficiency judgment was entered (R. 27-30). The landowners filed a motion to set aside the order and judgment and for a new trial, on the grounds that the court erred in not submitting the case to the jury, and erred in its rulings on the evidence (R. 31-32). The motion was denied (R. 33). This appeal followed (R. 33-34).

ARGUMENT

I

The District Court Correctly Ruled That The United States Should Not Pay An Enhanced Value For The Land Which It Has Itself Created

It is undisputed that the Government was in possession of this property under a leasehold from 1946 until the institution of the proceeding to condemn the fee title to the property (R. 64). And it is the testimony of appellants' witnesses that the establishment of the Village of Barrigada by the Government in its effort to rehabilitate the people of Guam and provide homes for them changed the use of the land from agricultural to residential and commercial (R. 63, 81, 90-91).[3] In this rehabilitation program, the Gov-

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[3] In *Naval Government of Guam* v. *11,825,263 Square Meters*, 102 F.Supp. 427 (1952), Judge Shriver states the economic conditions existing in Guam at that time and points out the drastic changes which resulted from the war, the Japanese occupation, and the re-occupation by the American armed forces. He states that:

> * * * prior to the war the economy of Guam was primarily an agrarian economy where many people had farmed the same land as their ancestors had done before them for generations. Land was available for purchase at small cost in terms of present prices. There were few modern roads and few automobiles. When Guam was retaken by our forces the process of major development began. Land was occupied as needed for military purposes. Roads were constructed and improvements made without reference to existing property lines. Most buildings had been destroyed and most of the people were left without homes. In short Guam suffered a very high degree of destruction and displacement of the indigenous population.
>
> After the Naval Government of Guam was re-estab-

ernment made large expenditures of money. In 1946, Congress appropriated $6,000,000 to be used "toward reconstruction of the civilian economy of Guam." 60 Stat. 17, 753. In the same year it appropriated $1,630,000 for the acquisition of property in Guam to carry out its program, 60 Stat. 803, and in 1948, $1,600,000 was appropriated for the same purpose, 62 Stat. 225. It is thus obvious that whatever enhancement in value has resulted to the subject land has been through the efforts and at the expense of the Government.

The rule is well established that the Government is not required to pay for an enhancement in value that it has itself created. In refusing a claim for the enhancement in the market value of a tug boat which the Government had requisitioned, which enhancement was found to have been brought about (1) by the great increase in shipping and harbor traffic because of the war, and (2) by the Government's need for vessels in the prosecution of the war, in *United States* v. *Cors*, 337 U.S. 325 (1949), the Court stated (p. 333):

> It is not fair that the government be required to pay the enhanced price which its demand alone

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lished the long process began of attempting to straighten out land titles and pay compensation for occupancy. The needs of the armed services increased due to the post war importance of Guam as a defense base. Large construction projects were begun. Thousands of workers were brought in and the resulting impact of these combined expenditures was to change the economy of Guam from primarily an agrarian economy to a business and service economy.

> has created. That enhancement reflects elements of the value that was created by the urgency of its need for the article. It does not reflect what "a willing buyer would pay in cash to a willing seller," *United States* v. *Miller*, *supra*, 374 [317 U.S. 369], in a fair market. It represents what can be exacted from the government whose demands in the emergency have created a seller's market. In this situation, as in the case of land included in a proposed project of the government, the enhanced value reflects speculation as to what the government can be compelled to pay. That is a hold-up value, not a fair market value. That is a value which the government itself created and hence in fairness should not be required to pay.

The subject lands obviously were "within the scope of the project from the time the Government was committed to it." Hence, the rule stated in *United States* v. *Miller*, 317 U.S. 369, 377, that "the Government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned," is clearly applicable. Hence, the trial court was correct in holding that the date of valuation was April 11, 1949, the date of taking (R. 112), *United States* v. *Dow*, 357 U.S. 17 (1958), but that the former owners of this agricultural land should not be paid for the land upon the basis that it was a built-up residential area (R. 117).

To compensate the landowners for the enhancement in land value because of its change in use from agricultural to commercial and residential when that change has been brought about by large expenditures of money by the Government would be an unjust en-

richment of the landowners at public expense, which is plainly not required by the Fifth Amendment to the Constitution, nor any other authority claimed by appellants (Br. 5-6). A landowner whose property is condemned "is entitled to receive the value of what he has been deprived of, and no more. To award him less would be unjust to him; to award him more would be unjust to the public." *Bauman* v. *Ross*, 167 U.S. 548, 574 (1897).

Appellants apparently ~~concede~~ CONTEND that the exclusion of enhancement represents an attempt to date valuation back to 1946 (cf. Br. 11). In *Miller* v. *United States*, 125 F.2d 75, 80 (1942), this Court thought that the rule there urged by the United States was similarly an attempt to change the date of valuation. The enhancement rule does no such thing, as the Supreme Court in the *Miller* case, 317 U.S. 369, makes perfectly plain. Valuation is determined at the date of taking, but the one particular element, enhancement caused by the activities of the United States, is excluded in determining that value. That is the instant case. And we submit there is nothing in the requirement that "just compensation" be paid that authorizes the conferring of such a windfall.[4]

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[4] The same fundamental policy is represented by the exclusion from value of improvements which the condemnor, when it condemns land, may have added to land while in possession under a lease or otherwise. *Old Dominion Co.* v. *United States*, 269 U.S. 55, 65 (1925); *Consolidated Turnpike Co.* v. *Norfolk &c. Ry. Co.*, 228 U.S. 596, 602 (1913); *Searl* v. *School District, Lake County*, 133 U.S. 553 (1890); *Anderson-Tulley Co.* v. *United States*, 189 F.2d 192, 196 (C.A. 5, 1951), cert. den. 342 U.S. 826; *Bibb County Georgia* v. *United States*, 249 F.2d 228 (C.A. 5, 1957).

II

The District Court Did Not Err In Directing A Verdict On The Government's Testimony

The rule is well established that "when the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims." *Brady* v. *Southern Ry. Co.*, 320 U.S. 476, 479-480 (1943). Appellants' argument that the district court was in error in directing a verdict on the Government's testimony as to the market value of the subject lands (Br. 6-13) is totally without merit, and ignores the legal principles discussed *supra*, pp. 7-9. The Government's testimony as to the value of the property was the only evidence presented on which a verdict legally could be based. Contrary to appellants' assertion (Br. 11), the Government's valuations were not based on 1946 values of farm lands. They were based on sales of agricultural land in the vicinity in 1948 and 1949, at or about the time of taking (R. 104-105), which were a proper basis for valuing the lands, since they were used solely for agriculture at the time the Government undertook its rehabilitation program. To have based the valuation on the land for its use as commercial and residential property at the time of taking would have included in that

value the enhancement which the Government had brought about.

Appellants' valuation admittedly included that enhancement (R. 82), and since they produced no testimony which excluded it, the court was correct in directing the verdict, and would have been obliged to set aside a jury verdict based on appellants' valuation. *Coppinger* v. *Republic Natural Gas Co.*, 171 F.2d 4, 5 (C.A. 10, 1948); *MacKay* v. *Costigan*, 179 F.2d 125, 127 (C.A. 7, 1950); *Citizens National Bank of Lubbock* v. *Speer*, 220 F.2d 889, 891 (C.A. 5, 1955). In affirming a judgment on a directed verdict in *Galloway* v. *United States*, 130 F.2d 467 (1942), affirmed 319 U.S. 372, this Court stated (p. 470): "There must be some substantial evidence offered" by the party against whom the motion for a directed verdict is made "to justify submission of the case to the jury." The term "substantial evidence" implies "competent evidence." *United States* v. *St. Louis Clay Products Co.*, 65 F.Supp. 645, 650 (E.D. Mo., 1946). The *Galloway* case and others relied upon by appellants (Br. 7-8) support the principles for which they are cited, but since no substantial or competent evidence was offered by appellants, there was no question of the trial court's weighing the evidence.

Nor was there any conflict in the testimony of the various witnesses as to use of the property, as contended by appellants (Br. 9-11). Their argument that there was direct testimony for them that the property was "residential and commercial (R. 61, 63, 80-81), and direct testimony to the contrary by ap-

pellee's witnesses" (R. 94, 107) is not supported by the record. The testimony of apellants' witnesses referred to is in regard to the classification of the property in 1949. The reference to the testimony of the Government's witness, Judge Bitanga (R. 94), was the use which was made of the property "after the war and before the establishment of the Village of Barrigada." His testimony is clear that at that time the property was used for agricultural purposes, and in 1949 it was already an "organized village by the military government," and there were "just some stores that they put up, stores and poolhalls" (R. 99). Nowhere in his testimony did he state that the property was being used for agriculture in 1949. And the Government's appraiser, Mr. Woelfl, stated that on April 11, 1949, the subject lots were "part of the Village of Barrigada" (R. 107). Later, in his cross-examination (R. 109), counsel began a question: "Mr. Woelfl, you said that Lots 1074, 1075 and 1069 were commercial and residential on April 11, 1949." Hence, appellants' argument (Br. 9-10) is inconsistent with the testimony brought out by their own counsel from the Government's witness, and should be ignored.

It is obvious that there was no competent evidence as to value except that presented by the Government, and no conflicting evidence as to the use of the property. Hence, there was nothing which should have been submitted to the jury. In passing upon the Government's motion, the court stated (R. 111-112):

> Your motion will be overruled or denied as to the question of Mr. Calvo's qualifying to testify

> but on the second part of the motion, there was nothing in any of the testimony introduced on behalf of the defendants to enable this jury to determine values. Mr. Calvo did not break down these values according to lot, according to locations, according to being on the highway or not being on the highway. The only testimony that Mr. Calvo gave was that the property was worth $1.00 per meter.

And in appellants' argument on the motion, the court stated (R. 114):

> Have you got a single case, single instance of any property that was sold for $1.00 per square meter? You questioned the importance of those sales. You didn't present any evidence at all as to those sales that have been made. Now if this jury relies on your side of the case, certainly some information, as the government gets it, as to what its opinions are based on if you have the sales of the land at this particular time which is the basis of its market value. The court must ask why didn't you? I can't permit this jury to guess without having something in the way of foundation to go on.

After directing a verdict based on the Government's valuations of the three parcels, the court gave counsel for appellants an opportunity to bring in any evidence the following morning which would justify its entering a different order. They did not take advantage of this opportunity, and are now asking this Court to re-weigh the evidence and give them another chance. In dealing with motions for directed verdicts, the appellate courts "do not consider contradictory evidence or the weight of the evidence, or the

credibility of the witnesses." *Marquette Cement Mfg. Co.* v. *Campbell Const., Co.*, 184 F.2d 352 (C.A. 6, 1950).

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the district court should be affirmed.

Respectfully,

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